Supreme Court
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NO. 97 611 AUG - 4 1997

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TROY L. GRAVES,
Petitioner

VS.

VESUVIUS USA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's summary judgment evidence was sufficient to raise fact issues precluding the entry of summary judgment in favor of Respondent on Petitioner's Title VII claim of race discrimination.

2. Questions that are essential to the determination of the ultimate legal issue cited above are:

   A. Whether Petitioner's summary judgment proof was sufficient to raise a fact issue as to a prima facie case of racial discrimination under McDonnell Douglas Corp. V. Green and/or Mayberry v. Vought; and

   B. Whether Petitioner's summary judgment proof, which included Petitioner's unrebutted testimony that he had been disciplined on three occasions prior to his discharge when a white person was at fault and was not similarly disciplined, and which included Petitioner's unrebutted testimony that he had been demoted from a position for which he was qualified and he was replaced by a white person, whom he had to train, and which included Petitioner's testimony contradicting the reason given by his employer for his discharge, were not factually sufficient to avoid summary judgment because Petitioner's testimony consisted of mere conclusions and opinions.

   C. If Petitioner's testimony, as described in B. above, was factual, was his testimony sufficient to raise a fact issue whether or not Respondent's proffered reason for Petitioner's discharge was false and pretextual.

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES 2

LIST OF ALL INTERESTED PARTIES 5

CITATIONS FOR REPORTS OF LOWER COURT 6
DECISIONS IN THIS CASE

STATEMENT OF JURISDICTION 6
COURSE OF PROCEEDINGS BELOW
BASIS OF SUPREME COURT JURISDICTION

STATEMENT OF MATERIAL CASE FACTS 9

ARGUMENT 11

INDEX OF AUTHORITIES

CASES: **Page**

Barnes v. Yellow Freight Systems, Inc., ... 23
778 F.2d 1096, 1101 (5th Cir. 1985)

Cole v. Ruidoso Municipal Schools, ... 8
43 F.3d 1373 (10th Cir. 1994)

De Bardeleben v. Cummings, ... 10
453 F.2d 320 (5th Cir. 1972)

Franceschi v. Hyatt Corp., ... 7
782 F.Supp. 712 (D.Puerto Rico 1992)

Franz Chemical Corp. v. Philadelphia Quartz, ... 10
594 F.2d 146 (5th Cir. 1979)

Hansen v. United States, ... 13
7 F.3d 137 (9th Cir. 1993)

International Shortstop, Inc. v. Rally's Inc., ... 21, 22
939 F.2d 1257, 1265 (5th Cir. 1991)

Impossible Electronics Techniques, Inc. V. Wackenhut, ... 11
Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1991)

Johnson v. Chapel Hill Independent School District, ... 24
853 F.2d 375 (5th Cir. 1988)

Kelly v. Boeing Petroleum Services, Inc., ... 23, 24
61 F.3rd 350 (5th Cir. 1995)

Mayberry v. Vought Aircraft Co., ... 13, 15, 26
55 F.3d 1086, 1090 (5th Cir. 1995)

CASES: **Page**

McDonnell Douglas Corp. v. Green, ... 12, 15, 24
411 U.S. 792 (1973)

Moore v. Eli Lilly Co., ... 11
990 F.2d 812, 815 (5th Cir. 1985)
cert denied. 114 S.Ct. 467, 126 L.Ed.2d 419 (1993)

Nissho-Iwai American Corp. v. Kline, ... 10
845 S.W.2d 1300 (5th Cir. 1988)

Pollock v. A.T.&T. Long Lines, ... 8
704 F.2d 860 (3rd Cir. 1986)

Richardson v. Oldham, ... 21
12 F.3d 1373, 1379 (5th Cir. 1994)

Rhodes v. Guiberson Oil Tools, ... 21
75 F.3d 989 (5th Cir. 1996)

Rodriquez v. General Motors Corp., ... 8
904 F.2d 531 (oth. Cir. 1990)

St. Mary's Honor Center v. Hicks, ... 7, 8, 21 23
113 S.Ct. 2742 (1993)

Savers Federal Sav. & Loan Ass'n v. Reetz, ... 10
888 F.2d 1497 (5th Cir. 1989)

Talley v. Bravo Pitino Restaurant, Ltd., ... 12
61 F.3d 1241 (6th Cir. 1995)

Texas Dept. of Community Affairs v. Burdine, ... 12, 15, 24
450 U.S. 248, 253 (1981)

CASES: **Page**

Thornbrough v. Columbus and Greenville R.R. Co., ... 23
760 F.2d 633, at 648 (5th Cir. 1985)

Topalian v. Ehrman, ... 12
954 F.2d 1125 (5th Cir. 1991)

STATUTES:

United States Code
28 U.S.C. §1254(1) 6
42 U.S.C. §1981 24
42 U.S.C. §2000(e)(Title VII) 8, 22

TREATISES:

44 DePaul Law Review 643 8

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not reported

United States Court of Appeals for the Fifth Circuit: not reported

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on the 5th of May, 1997. (A copy of the Fifth Circuit Judgment and Opinion is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a summary judgment entered by the United States District Court for the Western District of Texas, Waco Division. (A copy of the District Court's Order is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

This Petition is filed for two purposes: (1) to bring up a question of importance that significantly affected the outcome of this case and that s of grave public interest in the area of employment and civil rights, and (2) to secure uniformity of decisions between Circuit Courts of Appeals and between Circuit Courts of Appeals and this Supreme Court as follows.

Petitioner's summary judgment evidence in this case was entirely circumstantial.[1] The vast majority of Petitioner's circumstantial (or "indirect") proof of discrimination was not rebutted by the summary judgment evidence of Respondent, which included only two affidavits, (1) from Petitioner's immediate supervisor, Calvin Bell, and (2) from another employee whose testimony corroborated a small part of Mr. Bell's affidavit testimony. Both affidavits related solely to the facts and circumstances surrounding Graves' discharge. Also, both of Respondent's witnesses are black males, as is the Petitioner, and the district court[2] emphasized this fact in its opinion.[3]

Legal scholars, commentators, Congressmen and others have predicted that, following this Court's decision in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), a Plaintiff asserting a claim for individual disparate treatment will no longer be able to prove intentional racial discrimination if the claim relies solely on circumstantial or indirect proof. (See, e.g., *Rewarding employer's lies; Making intentional discrimination under Title VII harder to prove*, 44 DePaul Law Review 643 (1995), and references cited therein.) The future of claims, such as the claim asserted by the Petitioner in this case, is of great concern and interest to potential

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[1] A summary of Petitioner's summary judgment proof appears in the Statement of Material Facts, infra.

[2] The Court of Appeals merely adopted the district court opinion in this case.

[3] The district court seemed to consider the race of Petitioner's supervisor, and the race of the corroborating witness to be probative evidence against Petitioner's claim that Vesuvius intentionally discriminated against him (Court's Order, App. p.10-11) even though it has been well-established in the past that intraracial discrimination can and does occur. See Franceschi v. Hyatt Corp., 782 F.Supp. 712, 722 (D.Puerto Rico 1992) and cases cited therein.

litigants and professionals practicing in the area of employment law and civil rights.

The author of the DePaul Law Review note, cited supra, states that "while attempting to eliminate confusion regarding the allocation of proof in discrimination cases, the decision in St. Mary's creates confusion...." and "the question of what constitutes "sufficient" proof is presumably left open for the lower courts to resolve..." (at 711). However, summary judgments in individual disparate treatment cases based on circumstantial evidence substantially similar to the evidence presented in this case were denied and are still being denied in circuit courts other than the Fifth Circuit despite this Court's opinion in St. Mary's. See, e.g. Pollock v. A.T.&T Long Lines, 794 F.2d 860 (3rd Cir. 1986); Rodriquez v. General Motors Corp., 904 F.2d 531 (9th Cir. 1990); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1377-1381 (10th Cir. 1994).

The district court and the court of appeals assumed that this case had no legal significance and chose not to publish opinions. Obviously the Petitioner believes his case to have grave significance. If this Court compares this case with cases being decided in other circuits--even after St. Mary's--it should agree that there are grave disparities between circuits in the burden being placed on Plaintiff's asserting individual disparate treatment claims of discrimination. For these reasons, Petitioner urges this court to consider the summary judgment proof in this case as an opportunity to clarify the circumstances under which indirect or circumstantial evidence of discrimination will be sufficient to avoid summary judgment in the future.

STATEMENT OF MATERIAL FACTS

The record in this case established that Petitioner, "Graves", a black male, was employed by Respondent "Vesuvius" in 1988 (R. 11), and his employment was terminated on January 11, 1993 (Ex. 6, R. 324). His employment history, prior to

termination, included adverse employment actions as follows: (1) a written warning for "fighting" with a white employee, Meadors in 1990 (Ex. 8, R. 226), (2) a verbal warning for "carelessness" (Ex. 1, R. 217) in January of 1992, and (3) a verbal warning for "disobedience" in July of 1992 (Ex. 2, R. 218). The disciplinary action forms produced by "Vesuvius" confirmed that Graves disagreed with each disciplinary action at the time each occurred and Graves testified that each action was unjustified because he did not commit the acts that were alleged as the basis for the discipline imposed and that the white persons who were known by Vesuvius to be at fault in each instance were not similarly disciplined (R. 114-118 and R. 199-201; R. 118-128 and R. 195-196; R. 128-135). Vesuvius offered no summary judgment evidence disputing Plaintiff's testimony in this regard.

The record further established that shortly before Graves was discharged, a higher position, i.e. "lead man", was available temporarily, with the possibility that the assignment might become permanent. Graves had the highest seniority and was placed in the position, but Graves was removed from the position after one day and a white male, Danny Holt, who had less seniority than Graves, replaced him as lead man (R. 108-113; R. 180-182; R. 191-192). Mark Sullivan, a white male, made the decision to remove Graves from the position but he did not give any reason for his decision (R. 180, l. 9-15; R. 191-192). Graves actually had to train Holt for the lead man position (R. 191, l. 9-17). Danny Holt also took Graves' place after Graves was discharged and Holt ultimately was promoted to the position of lead man, even though there were three black males in the department who had seniority (R. 154).

The record further established that Graves' employment with Vesuvius was terminated on January 11, 1993. The personnel action form cited "disobeing orders" and "falsification of information" as reasons for Graves' discharge (Ex. 6, R. 324). Graves testified that he did not commit either of the acts that

were cited as the basis of his discharge (R. 166-178 and R. 201-204 and R. 209-212).[4]

As noted supra, Graves' supervisor, Bell[5], was also a black male. Vesuvius' summary judgment proof did not dispute Graves' testimony that Mark Sullivan, a white male, actually controlled the disciplinary actions and that Bell repeatedly told Graves that he (i.e. Bell) was instructed by his white supervisor to impose discipline on Graves (R. 199-200; R. 118, l. 20-23; R. 131, l. 19-24; R. 134, l. 15; R. 135, l. 7).[6]

Graves contended that his discharge was part of a pattern and practice of discrimination against him on the basis of his race and was also part of a plan by Vesuvius to open up positions for white employees, like Danny Holt, who had been laid off when Vesuvius shut down one of its two divisions, i.e. its "Viso" division (R. 159-164).

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[4] A complete analysis of the summary judgment evidence relating to the facts and circumstances surrounding Graves' discharge are discussed in detail in Petitioner's argument, in a section entitled "legitimate non-discriminatory reason". The evidence consisted of excerpts from Graves' deposition (testimony and exhibits) and two affidavits submitted by Vesuvius.

[5] After Graves' discharge, Bell was demoted from his supervisory position to a lead man position and was replaced by a white male (R. 161-162, 189).

[6] Graves also testified, without contradiction by Vesuvius, that after Graves was discharged, Bell told him that he was just following Sullivan's instructions when he terminated Graves and that either he (Bell) or Graves was going to get fired (R. 187).

ARGUMENT

Standard of Review

A court's grant of a summary judgment is to be reviewed de novo. "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the non-movant." Moore v. Eli Lilly Co., 990 F.2d 812, 815 (5th Cir. 1992), cert. denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993). The party seeking summary judgment is supposed to bear an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026,1031 (5th Cir. 1982). In determining whether the movant has met its burden, the Court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. Id., at 1031.

1. Summary Judgment Evidence. In the instant case, the District Court, and the Fifth Circuit, by adopting the District Court's findings and conclusions, implied that Graves' Response to Vesuvius' Motion for Summary Judgment was insufficient because it failed to "designate" specific facts as required by law, citing Nissho-Iwai American Corp. v. Kline, 845 S.W.2d 1300 (5th Cir. 1988); Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F.2d 1497 (5th Cir. 1989); Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146 (5th Cir. 1979); and De Bardeleben v. Cummings, 453 F.2d 320 (5th Cir. 1972). (Court's Order, R. 321-322) All of the cases cited by the court are clearly distinguishable from the case at bar and the record in this case will show very clearly that Graves' summary judgment proof was specifically referenced for the Court.

Vesuvius submitted two affidavits in support of its Motion for Summary Judgment, both of which had assertions of fact relating solely to Vesuvius' alleged reason for termination of

Graves' employment and to the facts and circumstances Vesuvius alleged to have occurred in connection with Graves' discharge (R. 60-63). In support of Graves' Response to Vesuvius' Motion, Graves submitted deposition excerpts (R. 099-229)[7] that contained:

1. A detailed statement of the events that occurred in connection with Graves' discharge, which contradicted and refuted the events described in Vesuvius' affidavits; and

2. A detailed statement of facts sufficient to establish a prima facie case of discrimination on the basis of race under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)[8] and under the Texas

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[7] In the district court's Order (R.322), the Court reiterated its implication that Plaintiff failed to meet his burden to "designate" facts responsive to a summary judgment motion, citing Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1991), which is also clearly distinguishable from the case at bar. In Topalian, the appellant, in response to motions for summary judgment, relied on its unsworn Pre-Trial Order and its Complaint (FN 14 at 1132; Text at 1133; FN 19 at 1133; Text at 1136; FN 31 at 1137; Text at 1137-1138) and a one page deposition excerpt and an unsigned letter (Text at 1138). In the instant case, Plaintiff relied on selected deposition excerpts from his own sworn deposition which is competent summary judgment proof clearly distinguishable from the unsworn pleadings and Pre-Trial Order offered in Topalian. The deposition excerpts include factual detail and not merely conclusions or opinions of Plaintiff.

[8] Vesuvius never contested the fact that Graves' position was filled by Danny Holt, a white male, who had previously been laid off when the VISO division was shut down. See Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995), wherein the Court held that the Plaintiff employee was not required to establish that he was similarly situated to the white employees who were rehired after layoff in

Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) and under Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995); and

3. A detailed statement of the events that occurred in connection with prior disciplinary action by Vesuvius and in connection with his removal as "lead man" when he was first replaced by Danny Holt; and Graves' statement of facts was sufficient to show that Vesuvius had engaged in a past pattern and practice of disparate treatment of Graves with respect to the terms and conditions of Graves' employment, particularly the terms and conditions relating to past disciplinary action imposed on Graves and not imposed on his similarly situated non-minority counterparts.

The district court's Order in this case (Order, R. 322) stated that a non-movant cannot rely on "conclusory" affidavits, citing Hansen v. United States, 7 F.3d 137 (9th Cir. 1993), implying that Graves' deposition excerpts are conclusory only.[9] Again, to the contrary, the record will show that Graves' testimony is replete with statements of fact as required by law; the specific statements of fact (as opposed to conclusions) were presented to the district court and the court of appeals and are presented in arguments below.

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order to satisfy the fourth prong of the McDonnell Douglas test where the Plaintiff presented evidence that his previous position was filled by a white person.

[9] Again, the case cited by the District Court, to-wit Hansen v. United States, is distinguishable from the case at bar.

All summary judgment proof referenced above is incorporated by reference herein for all purposes.[10]

2. Prima facie case. The district court initially acknowledged that Graves could prove a prima facie case by producing evidence that: (1) he is a member of a protected class; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) he was replaced by or the position was given to a non-minority (Order, R. 324). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Alternatively , the court stated that Graves could establish a prima facie case by showing that he did not violate the work rule or by showing that white employees who engaged in similar acts were not punished similarly (Order, R. 325). Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995). Despite the fact that Graves established a prima facie case of discrimination pursuant to McDonnell Douglas and Burdine, the district court erroneously assumed that Mayberry was the only paradigm applicable in this case and further erroneously determined that Vesuvius was entitled to summary judgment because Graves could not establish a prima facie case pursuant to Mayberry (Order, R. 332). Assuming arguendo that Mayberry is the *only* paradigm for a establishing prima facie case in this case, the summary judgment evidence, as a whole, including Graves' deposition testimony and statements, omissions and contradictions in Vesuvius' affidavits, nonetheless is sufficient to raise a fact issue with respect to whether or not Graves violated a work rule, and therefore is

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[10] Graves' argument and authorities in his Response to Vesuvius' Motion for Summary Judgment is also incorporated by reference and reasserted herein.

sufficient to withstand summary judgment in this case according to Mayberry (at 1090).[11]

3. Legitimate, non-discriminatory reason. Vesuvius claimed in court that Graves was terminated for violating two rules: (1) refusal to follow a supervisor's directive and (2) falsification of information on his time card. However, the affidavits submitted by Vesuvius did not support the district court's conclusion that Vesuvius cited both of these reasons at the time he was terminated.[12] Graves' deposition was clear and unambiguous that

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[11] The district court made at least three significant factual determinations that were simply not supported by the summary judgment evidence in this case. These factual errors, more likely than not, contributed to the court's erroneous conclusion that summary judgment should be granted in this case. Exhibit "A", attached hereto identifies the three major factual errors. The first error is most relevant to the issue of whether or not Graves' raised a fact issue with respect to a prima facie case of discrimination. The first error identified in Exhibit "A" is also extremely important to Graves' position that the justification stated by Vesuvius (via Bell's affidavit) for Graves' termination was actually fabricated after Graves was terminated.

[12] Bell's Affidavit referenced only one reason for Graves' discharge as of January 11, 1993, as follows:

> "On Monday, January 11, 1993, James Johnson, Mark Sullivan, and I met about Troy Graves, and we collectively decided that Troy Graves had to be terminated for violating a work rule which required him to follow a supervisor's directive. We then met with Troy Graves to discuss his refusal to return to work the previous Friday and the fact that he was being terminated for his refusal to follow a supervisor's directive..."(R.061)

Bell's affidavit did not state that Graves was told on January 11th that he was being discharged for "falsification of information."

on January 11, 1993, the day he was terminated, he was only told that he was being terminated for not putting in his "whole eight hours", and that he told his supervisors that he did put in his whole eight hours and they could verify that fact by looking at his time card. (See testimony in Exhibit "A", Error 1.) Vesuvius also submitted a termination form in support of its justification for Graves termination, but the form was not submitted to Graves for his signature on the day he was terminated and the Exhibit (No. 6, referenced in Exhibit "A", Error 1) showed on its face that it was amended on January 12, 1993, to add a charge of "falsification of information". Ex. No. 6 was also suspect because two distinctly different handwriting styles appeared in the "Comments" section of the form.

Bell's affidavit does allege that Graves told him (Bell), on January 8, 1993, at 1:40 p.m. that he (Graves) already clocked out. Bell's affidavit does not state, that he, Sullivan, and Johnson discovered, on January 8, 1993, that Graves had not punched out at 1:40 p.m. but had instead punched out at 2:04 p.m. Specifically, Bell's affidavit stated that:

> "After Graves left[13], I explained the incident to my supervisor, Mark Sullivan. He and I then informed James Johnson, Manufacturing Manager, and they reviewed the situation. *After reviewing what had happened and looking at Graves' time card, it was learned that Graves had not punched out when I first ordered him back to work at 1:40 p.m., but that he actually punched out at 2:04 p.m....* (R. 061, emphasis added).
>
> "At no time did Graves ask me for permission to leave work nor did I ever give him permission to leave. Graves did not tell me that he was going to clock out, but

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[13] Implicitly referring to Graves' departure on Friday, January 8, 1993, afternoon.

did tell me at 1:40 p.m. that he had already clocked out." (R. 061)

These paragraphs *precede* the paragraph in Bell's affidavit that described the meeting between Graves, Johnson, Sullivan, and Bell on January 11th, when Graves was discharged. The sequencing of the paragraphs in Bell's affidavit implies (but does not state) that Bell discovered that Graves actually clocked out at 2:04 p.m. before, rather than after the meeting on January 11th. The district court erroneously interpreted Bell's affidavit to mean that Bell, Sullivan, and Johnson had learned on January 8th that "Graves had not clocked out when Bell first ordered him back to work at 1:40 p.m. but had instead waited until 2:04 p.m. after Bell had ordered him back to work several times" (Order, R. 331) and that they had told Graves on January 11th, that he had been charged with "falsification of information" (Order, R. 331), i.e lying about clocking out at 1:40 p.m..

Graves' deposition testimony relating to the January 11th meeting is fully set forth in Exhibit "A" attached and clearly contradicts any implications that might have formed the basis of the district court's decision in this case.

In summary, based on the summary judgment evidence presented by Vesuvius (particularly Exhibit No. 6), a finder of fact could and probably would easily conclude that the *only* charge appearing on the Vesuvius Termination Form on January 11, 1993 was a charge of "disobeing [sic] an order." Such a charge might be consistent with Graves' testimony that he was accused of only one thing on January 11, 1993, i.e. "not working a full eight hours" or punching out early (ostensibly in violation of an order to return to work or without permission). It is much more likely that Bell, Sullivan, and Johnson did not learn that Graves had clocked out at 2:04 p.m. until after the meeting. When they discovered that Graves had not clocked out at 1:40 p.m. as Bell had probably told them, they had to deal with the time card that showed that he had clearly completed his eight-hour shift, so they added the charge of

"Falsification of Information" based on Bell's prior statement that Graves had told him that he clocked out at 1:40 p.m. Also, Bell's affidavit confirmed that the "falsification of information" charge was based on Graves' alleged statement to him that he (Graves) had "already punched out" at 1:40 p.m.

Graves testified that he did talk to Bell about 1:30 p.m., that he knew that he had to stay at his station until he was relieved by the next shift, that he did so, that he helped clean up in his area and the casting area and then left the plant (R. 201, l.22 - R. 205, l.10).

Bell's affidavit omitted significant relevant facts. Bell's affidavit does not account for the twenty-minute period between 1:40 p.m. (i.e., the time that Bell allegedly issued his original order to Graves to return to work and help clean up the floor) and 2:04 p.m. (i.e., the time that Graves clocked out and left the building). In other words, Bell does not state what he was doing or what Graves was doing during that time. Therefore, the twenty-minute gap, unaccounted for by Bell, also would have provided fodder for cross-examination questions such as "Why did Troy Graves hang around work from 1:40 p.m. until 2:04 p.m. if he was disobeying an order to return to work at 1:40 p.m.?"

Bell's affidavit expressly referenced only two instances when he allegedly ordered Graves to return to work, one at approximately 1:40 p.m. and one that was apparently after Graves clocked out at 2:04 p.m., i.e. after Graves had completed more than a full eight-hour day (R. 060). Bell claimed that he followed Graves out of the plant and ordered him to return to work. Bell's affidavit did <u>not</u> state that Graves had <u>not</u> completed the work he was told to do at 1:40 p.m. (R. 060) and did <u>not</u> state that there was still work to be done after Graves actually clocked out at or about 2:04 p.m. Bell's affidavit also did <u>not</u> state that other employees, whose shifts ended at 1:30 or 2:00 p.m., had not yet left the plant and/or were still working and/or cleaning their work areas. In other words, Bell's affidavit does <u>not</u> justify that his

alleged post-2:04 p.m. order was a "reasonable one", as required by the Employee Handbook introduced as summary judgment proof by Vesuvius, which states the misconduct that may lead to immediate termination includes: ..."6. Failing to carry out *any reasonable order* by a management representative, including ..." (R. 076, emphasis added) On the other hand, the undisputed summary judgment evidence, offered by Graves, was that he cleaned up his station, helped clean up two piles of debris that remained on the casting floor, left the "hopper" at the end of the aisle on the casting floor, and that other employees had already clocked out before he left and that the remainder clocked out shortly thereafter (R. 204).

Surely, under the state of the record in this case there was a fact issue as to whether or not the reason given by Vesuvius' for discharging Graves was true. If a Plaintiff educes evidence that the reason proffered by the employer is false or "incredible", and the jury disbelieves the employer, the Plaintiff's evidence that the employer's reason was false may in and of itself be sufficient to support a jury's finding of discrimination. Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996). In the instant case, Graves' evidence contradicting the credibility of Vesuvius' charges is buttressed with evidence that he repeatedly been disciplined in the past for acts which he did not commit, and the overall pattern of false accusations should clearly be sufficient to defeat Vesuvius' Motion for Summary Judgment.

4. Pretext. The district court unduly emphasized the fact that the two primary witnesses for Vesuvius in the summary judgment proceedings, i.e. Bell and Middleton, were themselves African-Americans (Order, R. 333). In so doing, the court disregarded Graves' undisputed summary judgment proof that Bell told Graves that he was just following Mark Sullivan's instruction when he recommended discharging Graves and that either he (i.e. Bell) or Graves was going to get fired (R. 187). Also, the summary judgment evidence is undisputed that Bell was subsequently demoted from his supervisory position to a lead man position after

Graves' discharge and was replaced by a white male (R. 161-162, R. 189). In this case, Bell's credibility and/or state of mind (e.g. the threats of termination by his white male supervisor, Mark Sullivan) are clearly at issue. As noted in Graves' Response to Vesuvius' Motion for Summary Judgment, prior to this Court's decision in St. Mary's, the Fifth Circuit had admonished that summary judgment may be inappropriate and should be utilized with extreme caution when either credibility or state of mind are at issue. See, e.g. Richardson v. Oldham, 12 F.3d 1373, 1379 (5th Cir. 1994)("Credibility determinations have no place in summary judgment proceedings."); International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1265 (5th Cir. 1991)("When state of mind is an essential element of the non-moving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility."). Credibility is an issue which can be resolved only through trial and the tool of cross-examination. International Shortstop, 939 F.2d at 1265-66. Determinations of intent are ill-suited to summary judgment for two reasons. First, "it is particularly difficult for the moving party to challenge the 'self-serving testimony' of the moving party without the benefit of trial accessories, namely cross-examination." International Shortstop, 939 F.2d at 1265. Second, "evidence probative of the moving party's state of mind may be more difficult to procure because it typically is held in the exclusive possession of the moving party". Id. at 1266. These axioms are particularly applicable in employment discrimination cases, warranting the sparing use of summary judgment for disposition. The employee bears a difficult burden in proving discriminatory intent.

> Intent can usually only be inferred from circumstantial evidence. Today, employers, and their supervisors, who might choose to discriminate on the basis of race have become, as a result of twenty years of Title VII litigation, too sophisticated to use racial epithets or to leave glaring tracks if an employee is being discharged for race-related reasons. Instead, the motive is veiled behind

> apparently neutral remarks about business necessity, an employee's inadequate performance and the like.
>
> . . .
>
> Thus, a court faced with a disparate treatment Title VII case such as this one must often look behind and beyond an employer's words and ask probing questions about the practices of the workplace, seeking out and attempting to resolve any inconsistencies in the manner of dealing with the employee in question. We should not be satisfied with anything less than a probing analysis of the facts if two people of different [protected classes], similarly situated, receive different treatment from their employer.

Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096, 1101 (5th Cir. 1985). See also Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633, 640-41 (5th Cir. 1985)("Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder."). Do these rules still apply after St. Mary's?

Contrary to decisions rendered by other Circuits courts, both before and after St. Mary's, in cases substantially similar to this case, the district court, and subsequently the Fifth Circuit erroneously held that Graves did not present any evidence of pretext, finding that Graves' examples of prior disparate treatment, such as his removal as lead man and replacement by Danny Holt, a white man, and past disciplinary actions that were unjustified by facts, were merely "extraneous examples" of "perceived" past discrimination and not probative evidence of pretext (Order, R. 333).

Prior to St. Mary's,[14] the Fifth Circuit had recognized that past acts evidencing disparate treatment of employees on the basis of race, sex, age, etc. are legitimate evidence of pretext and are sufficient to raise a fact issue that will defeat summary judgment. See, e.g. Johnson v. Chapel Hill Independent School District, 853 F.2d 375 (5th Cir. 1988), wherein hearsay testimony of disparate treatment of another employee, admitted without objection, and a Plaintiff's testimony that her white replacement was less qualified than she, was cited as sufficient evidence to support a trial court's finding that the Plaintiff had been discriminated against on the basis of her race (at p. 381). See also the Eighth Circuit cases that have held that an employer's past discriminatory policy and practice "should normally be freely admitted at trial" because it may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination", which cases are cited as authority by the Fifth Circuit in Kelly v. Boeing, cited supra, at p. 358-359.

In the instant case, Graves presented summary judgment evidence that he had been the victim of disparate treatment on prior occasions. One such example of disparate treatment arose within the two months preceding Graves' termination, when Graves was "in line" to serve as lead man in the absence of his regular lead man, Mike Garcia. Graves did serve in that position for one day, but was subsequently removed and replaced by a white man, Danny Holt, who had less seniority than Graves. In evaluating the probative value of Graves' evidence relating to this particular incident, the district court erroneously stated the summary judgment facts presented by Graves, and erroneously

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And in one case decided after St. Mary's, to-wit: Kelly v. Boeing Petroleum Services, Inc., 61 F.3rd 350 (5th Cir. 1995), wherein the Court stated "In discrimination cases...such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive" (at p. 360).

concluded that Graves' evidence was insufficient to raise an issue of discrimination because Graves relied "solely on seniority to support his position that he was qualified for the position of lead man." In addition to the evidence relating to Graves' greater seniority, Graves' undisputed summary judgment evidence was (1) that he had actually served as lead man for one day and (2) that, when he was removed, by directive of Mark Sullivan, a white man, Graves was assigned to *train* his white replacement to perform the job of lead man. (See Factual Misstatement Example No. 2 in Exhibit "A", attached, for complete details of Graves' deposition.) If one analyzes Graves' evidence relating to this "lead man" incident, the evidence clearly meets the McDonnell Douglas and Burdine requirements for proving a prima facie case of discrimination against Graves in the past. Graves' testimony established that he was a member of a protected class, that he was qualified for the position (by actual service as lead man and by the fact that he had to train his replacement), that he was removed from the position, and that he was replaced by a white man. Vesuvius did not present any summary judgment evidence rebutting Graves' testimony. Absent some statement of a legitimate non-discriminatory reason by a Defendant, the presumption of discrimination, created by a Plaintiff's prima facie case, is clearly sufficient to raise a fact issue as to whether or not disparate treatment occurred.

Other examples cited by Graves as evidence of past discrimination against him also met the legal requirements of proving a prima facie case of discrimination. For example, in July of 1992, six months prior to Graves' termination, Graves was cited for alleged "disobedience" for not showing up for work on a Saturday. Graves testified that he was not scheduled to work on the Saturday in question, that Kent Leech, a white employee, was scheduled to work, and that Kent Leech did not show up for work and was not cited for failing to appear; Vesuvius did not offer any rebuttal to Graves' testimony. Under Mayberry, cited supra, Graves' evidence is sufficient to establish a prima facie case of discrimination in this incident because the evidence establishes

without dispute that Graves did not commit the work rule violation as charged; and therefore Graves' testimony is sufficient to establish a presumption of racial discrimination in the case of the July, 1992, disciplinary action. (R. 128-135) By way of further example, in January of 1992, twelve months prior to Graves' termination, Graves was disciplined for "carelessness" for allegedly pouring molds improperly. Graves testified that he did not pour the molds and played no role in the production of the defective items except to deliver the funnels to the white employees that poured the molds. Again, Vesuvius did not offer any evidence disputing Graves' testimony. Again, under Mayberry, cited supra, Graves' evidence would be sufficient to establish a prima facie case of discrimination in this incident (involving an allegation of a work rule violation) because the evidence establishes without dispute that Graves did not commit the work rule violation as charged and therefore Graves' testimony is sufficient to establish a presumption of racial discrimination in connection with the January, 1992, disciplinary action. (R. 118-128; 195-196) By way of further example, Graves was disciplined for "fighting" in 1990. Graves testified that he did not fight, that he did not start the fight, that he did nothing to incite a white co-worker to kick him (i.e. Graves) and that the co-worker admitted to Mr. Sullivan that it was his fault and that Graves had not done anything wrong, but that Sullivan, a white male, would not believe that Graves didn't precipitate the kick. Again, Vesuvius did not offer any evidence disputing Graves' summary judgment evidence. Under Mayberry, cited supra, Graves' evidence again is sufficient to establish a prima facie case of discrimination in this incident (involving an allegation of a work rule violation) because the evidence establishes without dispute that Graves did not commit the violation. Therefore, Graves' testimony is sufficient to establish a presumption of racial discrimination in connection with the 1990 disciplinary action. (R. 114-118; 199-201)

Graves also presented evidence that he was denied benefits that were freely granted to white employees. Graves testified that the week prior to his termination on January 11, 1993, another

employee, Ben White (who was white) was allowed to leave work early because his wife was sick. Graves, who also requested to leave because his wife was sick during the same week was not allowed to leave early. The district court incorrectly stated the facts relating to Graves' request to leave early during the week preceding his termination, concluding that Graves' *only* request to leave early was the request precipitated by the need to "fix a flat". (See Court's Order, R. 334 and Factual Misstatement No. 3 in Exhibit "A" attached for complete detail.) In fact, the early leave requests by White and Graves were exactly the same; however, the white employee's request was granted and Graves' request was denied. This testimony by Graves is also probative evidence of disparate treatment, raising a prima facie presumption of discrimination on the basis of race. Again, Graves' testimony was not rebutted by Vesuvius' summary judgment evidence.

The accumulation of these examples of previous disparate treatment in the terms and conditions of Graves' employment clearly is sufficient to raise a fact issue as to whether race discrimination was a "motivating factor" in the final decision to terminate Graves' employment.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant Petitioner's Petition for Writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on May 5, 1996, reverse the Judgment of the Fifth Circuit Court of Appeals, and remand this case to District Court for trial on the merits.

Respectfully submitted,

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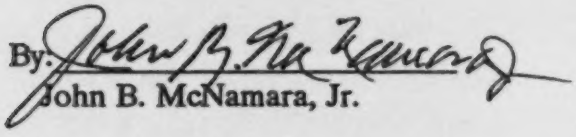
By: 
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EXHIBIT "A"

"INCORRECT FACTUAL STATEMENTS IN COURT'S OPINION"

1. **COURT'S OPINION:**

"On January 11, 1993, Bell, Johnson and Sullivan met with Graves and informed him that he was being terminated for violating a work rule which required him to follow a supervisor's directive *and for falsification of information on his time card.*" (Opinion, p. 13, emphasis added)

Actual Evidence:

(a) Bell Affidavit:

"We then met with Troy Graves to discuss his refusal to return to work the previous Friday and the fact that *he was being terminated for his refusal to follow a supervisor's directive.*" (emphasis added)

(b) Graves Deposition: p. 101-103

"Q. ...what time did you go in on January 11, 1993?
A. About 5:00.
Q. And what happened after you went to work?
A. I was working on the casting floor and they told me they -- Calvin came to me and said they're -- having a meeting, they need you in a meeting.
Q. About how long was that after you came to work at 5:00 a.m.?
A. Maybe about an hour, maybe about an hour.
Q. Okay. And who was in that meeting that you went to?
A. It was Calvin Bell, Mark Sullivan and Jim Johnson.
Q. What were you told during that meeting?

A. *That I was being terminated for not putting in my whole eight hours.* (emphasis added)

Q. On what day were they saying you had to put in the whole eight hours?

A. That Friday, or let's say January the 8th, if it was that Friday.

Q. Okay. Tell me what you recall Mr. Bell saying during that meeting.

A. During the meeting, Mr. -- Calvin didn't say anything, he just told me it was a meeting.

Q. And he --

A. Mark Sullivan and Jim Johnson was doing the meeting.

Q. So Calvin went to the meeting but he didn't say anything. Is that right?

A. Right.

Q. And what did Mark Sullivan say during the meeting?

A. He said that he had my files right here. He had like a folder and he didn't show me no documents or anything and he said that -- that I had clocked out early and that was my intention, and *he said that I clocked out early and they was going to fire me -- determinate me or fire me for clocking out early, that I didn't put in my eight hours.* (emphasis added)

Q. Do you recall Mr. Sullivan saying anything else during the meeting?

A. And he said that, you know, he had, you know, supposed to have been, I guess -- you know, a witness at that time, you know.

Q. Do you recall Mr. Sullivan saying anything else during that meeting?

A. That was it.

Q. What --

A. He told me to leave at that time and I got up and left.

Q. And departed the plant?
A. He told me to leave at this time, yes.
Q. What did Mr. Johnson say during the meeting on the morning of January 11, 1993?
A. *They both agreed that was the reason that they was determinated me, were firing me for, for leaving work early, didn't put in my full eight hours.* (emphasis added)
Q. On the previous Friday?
A. On that Friday.
Q. Do you recall anything else that Mr. Johnson said during that meeting?
A. Not at this time, no.
Q. What did you say during the meeting?
A. *I told them to check the time card, they'll see what time that I clocked out.* (emphasis added)
Q. Do you recall saying anything else?
A. That's it."

(c) Graves' Deposition: p. 182 - Re: Exhibit 6 (termination report)

"Q ... I want to show you what's been marked as Graves Exhibit 6. Now, this document right here, did you ever see that during that discussion that you had with Mr. Sullivan and Mr. Bell and Mr. Johnson?

A. No.
Q. You never signed it?
A. No.
Q. And did they ever prepare a form or do anything or have you sign anything that was like in Exhibit 1 here?

A. No. I didn't sign anything in that -- on that morning.

(d) Note Re: Exhibit 6

Exhibit 6 shows on its face that it was amended on January 12, 1993 (the day after meeting with Graves) to include a charge of "Falsification of Information". Also the statement "He also lied about having punched out his time card" appears to have been added to the form (under "Additional Comments") since the handwriting is clearly different from the handwriting of other statements included in the "Additional Comments" section of the form.

2. COURT'S OPINION:

"Plaintiff also complains that the decision to not appoint him to a lead man position was discriminatory; however, *he fails to provide the Court with any summary judgment proof of discrimination other than the fact that he claims the position was given to a white man with less seniority.*" (Opinion, p. 16, emphasis added)

Actual Evidence:

(a) Graves Deposition: Beginning on p. 136, line 1

"Q. ... I was denied this because they stated that they didn't want me to be the lead man over this crew." That's an accurate statement of your position?
A. I know they didn't let me be the lead man over the crew --
Q. Yeah.
A. -- that would be almost accurate, yes.
Q. Who told you they didn't want you to be the lead man over this crew?
A. Well, the job was took from me when Mark Sullivan didn't let me be the lead man.
Q. When did that occur?

A. Back in the fall of '92. Remember when I --

Q. That's when they put Danny Holt there?

A. Yes.

Q. Okay. What I'm trying to find out is did anyone specifically say to you, "We don't want you to be the lead man," or words to that effect?

A. Well, when they gave it -- no, they didn't say those exact words, but they didn't let me be the lead man, period.

• • •

(Resuming on page 176, line 3)

Q. Did you ever talk to Mr. Sullivan about -- Well, let me ask you this: did you ever serve as the lead man when Mike Garcia was either on vacation or on decision-making leave or whatever he was doing, did you ever serve as the lead man?

A. Yes, for one day.

Q. And who -- who told you the next day or how were you told -- When you came in the next day, did you expect to be the lead man again?

A. Yes. But they had a meeting -- *Mark Sullivan held a meeting that morning and told me that I had to train Danny Holt for that position and Danny was going to be the lead men -- lead man.*
And I trained him and I taught him, I trained him.
(emphasis added)

Q. Did you express your -- any dissatisfaction with that decision to Mr. Sullivan?

A. Yes, at the time, I told him that wasn't right, I had more seniority than he did and that they told me that whenever Mike Garcia was absent or Calvin be absent, that Mike Garcia would go to Calvin's position and I would be the lead man. And it was taken away from me, they didn't let me be the lead man.

Q. And how long did that occur, how long was it before you were terminated that that occurred, if you recall?

A. It wasn't months, wasn't' even two months. Two -- a couple of months, put it like that.

3. COURT'S OPINION:

"Plaintiff claims that Brian West, another Vesuvius employee, left work early, but Plaintiff was not allowed to do so in this case. Bell Depo. (sic) at p. 74. The situations, however were clearly not substantially similar; *West was allegedly allowed to leave early because his wife was sick and Plaintiff requested to leave early because he wanted to fix a flat.*" (Opinion, p. 15-16, emphasis added)

Actual Evidence:

(a) Graves Deposition: Beginning on p. 74, line 4

"Q. ... Okay, before we took the break you were telling me about an incident involving Ben West. Would you go ahead and tell me what involving Ben West you think amounted to racial discrimination?

A. Yes. On Ben West, he was getting off at 3:30, he was going -- leaving work early, where we had to work -- where I had to work, you know, longer terms, work back on the casting floor, and we were supposed to go back to the casting floor and maybe help out on the casting floor to get them out earlier for due to the production.

Q. And Mr. West was white?

A. Yes.

Q. And you believe he got to leave early because he was white and you had to stay later because you were black?

A. Yes.

Q. Did that instance of Mr. White -- Mr. West getting to leave early happen on more than one occasion?
A. Yes.
Q. On about how many occasions?
A. During that week, he was leaving all during -- all during that week early. So it's been more than over four times.
Q. Did it happen just during one week?
A. It was -- happened before, you know. You know, sometimes in that week or before that week, sometimes he would leave early, wasn't working the -- the overtime.
Q. Do you have any idea why he was leaving early?
A. He had stated that his wife was sick. Due to that, that's the only reason I know, other than that.
Q. Do you have any reason to believe he was not telling the truth?

. . .

(Resuming on p. 76, line 19)

Q. *Was there ever an instance when your wife was sick and you asked to leave early and they told you you couldn't leave*?

(Brief pause.)

A. *Can I say this? Yes, I -- I asked to leave early before I was determinated that week or my wife also sick that same -- during that week when I got determinated.* (emphasis added)

(Resuming on p. 77, line 6)

Q. Who told you you couldn't leave?
A. Calvin Bell.
Q. Did you go ahead and leave anyway?
A. No.